

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER )  
RIGHT NO. G(W)138943-41H BY )  
CLARENCE J. KIMM, SR. )

AMENDED  
ORDER

\* \* \* \* \*

On June 17, 1991, the Department of Natural Resources and Conservation received a letter from William S. Dockins, attorney for several parties to this matter, which requests the Department's Order of June 10, 1991, be amended to correct a clerical error. The letter identifies the clerical error as an incorrect subdivision number in lines two and ten on page five of the Order. The letter states that "Lot 3 Mountain View Subdivision No. 3" should read: Lot 3 Mountain View Subdivision No. 5.

A thorough review of the complete file in this matter confirms that the Order as issued does contain the error as identified by Mr. Dockins, and that the correct subdivision number is that identified by Mr. Dockins. Therefore, the Department hereby issues the following:

AMENDED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right No. G(W)138943-41H be issued to Clarence J. Kimm, Sr., to change the points of diversion and place of use of said water right. The points of diversion shall be in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$

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of Section 16, Township 1 South, Range 5 East, Gallatin County, and/or in Lots 6, 7, and 8 of Mountain View Subdivision No. 4, Lot 3 of Mountain View Subdivision No. 5, Lots 26, 28, 29, and 30 of Mountain View Subdivision No. 6, and Lots 23 and 24 of Mountain View Subdivision No. 7, all in the SE $\frac{1}{4}$  of Section 16 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 21, Township 1 South, Range 5 East, Gallatin County. The place of use for irrigation purposes shall be on 320 acres in the N $\frac{1}{2}$  of Section 16, Township 1 South, Range 5 East, Gallatin County, and 12 acres of lawns and gardens in Lots 6, 7, and 8 of Mountain View Subdivision No. 4, Lot 3 of Mountain View Subdivision No. 5, Lots 26, 28, 29, and 30 of Mountain View Subdivision No. 6, and Lots 23 and 24 of Mountain View Subdivision No. 7, all in the SE $\frac{1}{4}$  of Section 16 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 21, Township 1 South, Range 5 East, Gallatin County.


The flow rate diverted under this appropriation shall not exceed 2.5 cubic feet per second. The volume of water diverted under this appropriation shall not exceed 134.92 acre-feet per year. The period of appropriation and use shall be May 1 through October 31 of each year.

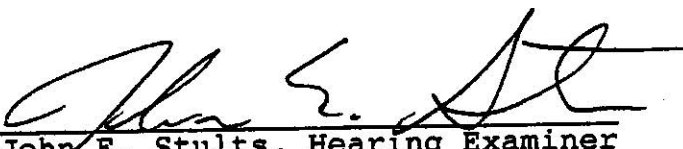
Appropriator Clarence J. Kimm shall cause to be installed in his diversion works a measuring device capable of measuring the flow rate and recording the volume of water diverted from this source and prior to comingling with any other waters, and shall keep written records of the volume used over the irrigation season of each year. Said records shall be submitted to the Bozeman Water Resources Regional Office of the Department of

Natural Resources and Conservation no later than November 30 of each year and upon request.

This appropriation is supplemental to Statements of Claim to Existing Water Right Nos. 41H-W037055-00, 41H-W037054-00, and 41H-W037053-00 which means they have overlapping places of use, specifically the 320 acres in the N $\frac{1}{4}$  of Section 16, Township 1 South, Range 5 East, Gallatin County.

Dated this 21 day of June, 1991.

  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
John E. Stults, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amended Order was duly served upon all parties of record at their address or addresses this 24<sup>th</sup> day of June, 1991, as follows:

Clarence J. Kimm, Sr.  
23901 Frontage Road  
Bozeman, MT 59715

Michael Zimmerman  
General Counsel  
Montana Power Company  
40 East Broadway  
Butte, MT 59701

John and Hallie Christiansen  
529 Mountain View Drive  
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Matt Williams  
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BEFORE THE DEPARTMENT OF  
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FOR CHANGE OF APPROPRIATION WATER )  
RIGHT NO. G(W)138943-41H BY )  
CLARENCE J. KIMM, SR. )

ORDER

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On May 10, 1991, the Hearing Examiner received a Settlement Agreement and Consent to Entry of Order signed by all parties in this matter. The specific terms of the Agreement include: a delineation of the portional interests held by individual owners of Claimed Water Right No. W138943-41H; the total amount of the appropriation as reduced from the amounts identified in the Temporary Preliminary Decree issued by the Montana Water Courts and as identified in the above-entitled application; the changed place of use and changed points of diversion; an identification of the supplemental relationship involving W138943-41H; and a measuring device requirement.

On May 30, 1991, a telephone conference was conducted by the Hearing Examiner involving the attorneys for all parties and a staff member of the Department of Natural Resources and Conservation (Department). The purpose of the conference was to discuss the Agreement and determine whether the elements of the Agreement were a proper settlement of the points at issue given the parameters of the case as defined by the application, objections, and notices. It was determined that the Agreement did properly

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**CASE #** 138943

settle the issues. Therefore, the Settlement Agreement and Consent to Entry of Order is hereby accepted.

The Agreement settled the many objections contending multiple ownership of Claimed Water Right No. W138943-41H. All objectors now recognized as owners of W138943-41H, plus other Mountain View Subdivision property owners also recognized as owners of W138943-41H, have filed Water Right Transfer Certificates (Form 608) with the Department to document their ownership. The Department does not have the authority to enforce internal cotenancy arrangements entered into by co-owners of a water right, however it is noted here that the parties stated at the telephone conference a written cotenancy arrangement has been entered into with respect to the use of W138943-41H that is satisfactory to all co-owners and should prevent diversions in excess of the limits of said water right.

The Agreement changes the subject water right by reducing the volume per year from 912.18 acre-feet to 134.92 acre-feet, and by reducing the past place of use from 192 acres to 12 acres and adding a new place of use of 320 acres. The Agreement also changes the water right by replacing the former point of diversion with several new points of diversion. This is somewhat different than the original application form and subsequent notices. The form stated the new place of use would entirely replace the old place of use and one new point of diversion would replace the old point of diversion. While the application form specifically stated this, the notices were not so specific. It

is generally implied in a change proceeding that the application can be granted or denied in whole, in part, or with modifications. See Mont. Code Ann. §§ 85-2-312(1) and 402(7) (1989). The modifications in this case do not amount to an expansion of the proposed change for these reasons: the amount of the appropriation has been significantly reduced; even though the place of use will include parts of what was historically irrigated in addition to the new place of use, the new place of use is not expanded beyond what was in the application and notices; and the additional points of diversion are merely secondary points of diversion within the historic system of W138943-41H as identified in the Temporary Preliminary Decree, application, and notices, and in fact more clearly and specifically identify the appropriation works thereby easing future administration of the changed water right.<sup>1</sup>

Objector Mountain View Homeowners' Association, not being signatory to the Agreement, withdrew their objection to this application by letter dated May 8, 1991, signed by members of the Association's administrative council, Karen Porter and Patrick F.

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<sup>1</sup> All parties agree the watercourse that branches off of the unnamed tributary of the East Gallatin River in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  Section 16, Township 1 South, Range 5 East, (the claimed historic point of diversion) and passes through Mountain View Subdivision adjacent to the lots identified as places of use could be natural rather than man made. They further state that there are and have been no controls at the claimed diversion point. In the opinion of all parties, it more accurately reflects the actual diversion system to identify the individual points on this watercourse where appropriators divert water to their use than it would to identify the uncontrolled, claimed "point of diversion."

6-20-91



Hensleigh. (Mr. Hensleigh is a signatory of the Agreement as an individual objector and as a co-owner of the subject right.)

In the Application materials, Applicant made a prima facie showing of substantial credible evidence that the criteria for authorization of change in appropriation water right stated in § 85-2-402(1), MCA, have been met. Furthermore, at the May 30, 1991, conference Objector Montana Power confirmed that a change in the subject water right limited to the terms of the Agreement settled their fear of adverse effects. At the same conference, the Department's staff representative stated that a change in the subject water right limited to the terms of the Agreement was reasonable, acceptable to the Department, and satisfied the Department's concerns about future administration of the changed right. Therefore it is concluded that the criteria in § 85-2-402, MCA, have been met.

All parties having withdrawn their objection or agreed to issuance of an Authorization to Change Appropriation Water Right No. G(W)138943-41H subject to certain conditions expressed in the Settlement Agreement and Consent to Entry of Order entered into on May 1, 1991, it is hereby

ORDERED that, subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right No. G(W)138943-41H be issued to Clarence J. Kimm, Sr., to change the points of diversion and place of use of said water right. The points of diversion shall be in the NE¼SE¼NW¼ of Section 16, Township 1 South, Range 5



East, Gallatin County, and/or in Lots 6, 7, and 8 of Mountain View Subdivision No. 4, Lot 3 of Mountain View Subdivision No. 3, Lots 26, 28, 29, and 30 of Mountain View Subdivision No. 6, and Lots 23 and 24 of Mountain View Subdivision No. 7, all in the SE $\frac{1}{4}$  of Section 16 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 21, Township 1 South, Range 5 East, Gallatin County. The place of use for irrigation purposes shall be on 320 acres in the N $\frac{1}{2}$  of Section 16, Township 1 South, Range 5 East, Gallatin County, and 12 acres of lawns and gardens in Lots 6, 7, and 8 of Mountain View Subdivision No. 4, Lot 3 of Mountain View Subdivision No. 3, Lots 26, 28, 29, and 30 of Mountain View Subdivision No. 6, and Lots 23 and 24 of Mountain View Subdivision No. 7, all in the SE $\frac{1}{4}$  of Section 16 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 21, Township 1 South, Range 5 East, Gallatin County.

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Appropriator Clarence J. Kimm shall cause to be installed in his diversion works a measuring device capable of measuring the flow rate and recording the volume of water diverted from this source and prior to comingling with any other waters, and shall keep written records of the volume used over the irrigation season of each year. Said records shall be submitted to the Bozeman Water Resources Regional Office of the Department of

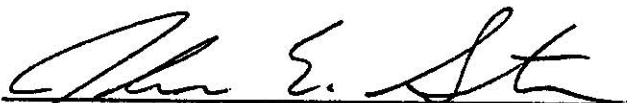
Natural Resources and Conservation no later than November 30 of each year and upon request.

This appropriation is supplemental to Statements of Claim to Existing Water Right Nos. 41H-W037055-00, 41H-W037054-00, and 41H-W037053-00 which means they have overlapping places of use, specifically the 320 acres in the N $\frac{1}{4}$  of Section 16, Township 1 South, Range 5 East, Gallatin County.

Dated this 10 day of June, 1991.



Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605



John E. Stults, Hearing Examiner  
Department of Natural Resources  
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Clarence J. Kimm, Sr.  
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Bozeman, MT 59715

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General Counsel  
Montana Power Company  
40 East Broadway  
Butte, MT 59701

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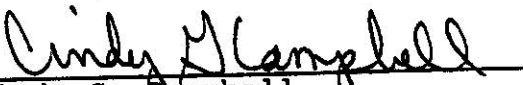
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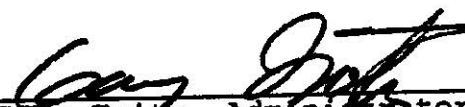
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Objector Mountain View Homeowners' Association, not being signatory to the Agreement, withdrew their objection to this application by letter dated May 8, 1991, signed by members of the Association's administrative council, Karen Porter and Patrick F.

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<sup>1</sup> All parties agree the watercourse that branches off of the unnamed tributary of the East Gallatin River in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  Section 16, Township 1 South, Range 5 East, (the claimed historic point of diversion) and passes through Mountain View Subdivision adjacent to the lots identified as places of use could be natural rather than man made. They further state that there are and have been no controls at the claimed diversion point. In the opinion of all parties, it more accurately reflects the actual diversion system to identify the individual points on this watercourse where appropriators divert water to their use than it would to identify the uncontrolled, claimed "point of diversion."

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In the Application materials, Applicant made a prima facie showing of substantial credible evidence that the criteria for authorization of change in appropriation water right stated in § 85-2-402(1), MCA, have been met. Furthermore, at the May 30, 1991, conference Objector Montana Power confirmed that a change in the subject water right limited to the terms of the Agreement settled their fear of adverse effects. At the same conference, the Department's staff representative stated that a change in the subject water right limited to the terms of the Agreement was reasonable, acceptable to the Department, and satisfied the Department's concerns about future administration of the changed right. Therefore it is concluded that the criteria in § 85-2-402, MCA, have been met.

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Dated this 10 day of June, 1991.



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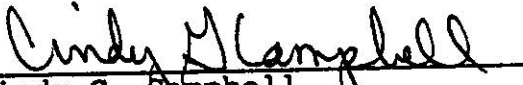
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